110-729

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 156.

THE UNITED STATES, APPELLANT,

vs.

SETH B. RYDER, EDWARD P. WILLIAMS, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED OCTOBER 18, 1880.

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INDEX.

	Original.	Print.
Petition of appeal	1	1
Bill	4	2
Demurrer of Seth B. Ryder	38	14
Demurrer of State National Bank	40	15
Demurrer of Henry W. Williams	42	16
Decree	45	17
Clerk's certificate	48	18

1 *Petition for appeal.—Filed October 5, 1880.*

United States circuit court, district of New Jersey.

THE UNITED STATES OF AMERICA
vs.
SETH B. RYDER AND EDWARD P. WILLIAMS and others.

The appeal of the United States of America, complainants in the above-entitled action, against Seth B. Ryder, Edward P. Williams, Frederick W. Foote, the National State Bank of Elizabethtown, New Jersey; George J. Cook, John W. Valentine, and Frederick A. Sandland; William R. Gilbert and Stephen J. Weaver, Joseph C. Alexander, George A. Morrison, and John Harriman; J. Dayton Winans, William Judge, James Judge, and Robert Judge; William S. Potter, William A. Tupper, Charles J. Strauss, and Maurice Aronstein; Jean B. Virolet and Isaac Durlach; Philo Mills and John Gibbs; Thomas J. Hood, James Bonbright, Henry W. Gundacker, John A. Meehan, Andrew C. Sinn, Samuel M. Kelly, Solomon S. Miller, Uriah G. Fox, and Samuel B. Brown; Carlton
2 Ayres, John Rall, William E. C. Bradley, George A. Williamson, and Charles James, H. L. Butler, Jonathan J. Broome, Oliver M. Clapp, Charles Walker, John Herberton, and John T. Davis, Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, and Daniel Robinson, the Rector, Church-wardens and Vestrymen of St. John's Church in Elizabethtown, Keen Pruden, William S. Rolston, Moses H. Ayres; Moses H. Ayres, administrator of Barzillai Ayres, deceased; William J. Harris, James H. Dunham, William T. Buckley, Thomas A. Painter, Walter Fletcher, Herman Chapin, Charles H. Webb and Edward A. Ranney; Albert L. Eastman, Milu P. Dayton, Samuel G. Gardner and Alden B. Bigelow; Henry S. Stotesbury, trustee in bankruptcy of Theodore Emery, Henry Ivey, and Henry C. Lee; and Henry W. Williams, respectfully shows that they filed their bill of complaint in the above cause on the thirteenth day of November, eighteen hundred and seventy-seven, against the said Seth B. Ryder and the other defendants above named, in a suit in equity, praying such relief
3 as by the prayer of said bill, will more fully and at large appear. Afterwards the defendants Seth B. Ryder, the National State Bank of Elizabeth', New Jersey, and Henry W. Williams filed their several general demurrers to the same, and thereupon such proceedings were had in the said cause that the said demurrers were sustained and the bill was dismissed by a final decree of the said circuit court of the United States.

The said Frederick W. Foote has since departed this life, and Vaslete B. Foote has qualified as his executrix. The said Keen Pruden has departed this life, and Samuel Osborn and Caleb C. Pruden have qualified as his executors.

The said complainants, The United States of America, therefore pray an appeal to the Supreme Court of the United States, to be held on the second Monday of October next, from the whole of the said final decree, claiming to be aggrieved by the same.

A. Q. KEASBEY,
U. S. Dist. Att'y.

Bill for injunction and relief.—Filed November 13, 1877.

To the honorable the judges of the circuit court of the United States of the district of New Jersey:

The United States of America brings this bill against Seth B. Ryder, of the city of Elizabeth, in the said district of New Jersey; and thereupon your orator complains and says that on the eighth day of November, eighteen hundred and seventy-six, Edward P. Williams, Otis Woodruff, Amos Clark, 2nd, and Richard A. Kipling, all of the said district of New Jersey, entered into a certain obligation or recognizance, wherein and whereby they and each of them acknowledged that they were indebted to the United States of America in the sum of ten thousand dollars, to be made and levied of their respective goods and chattels, lands, tenements, and hereditaments if default should be made in the condition therein mentioned; that in case the said Edward P. Williams should appear in person at Trenton, before the United States district court there and submit to such sentence as the said court should order and direct, then the said recognizance
5 to be void; otherwise to be and remain in full force and effect, as in and by the said recognizance of record in the office of the district court of the United States at Trenton, New Jersey, reference thereto being had, will more fully and at large appear.

And your orator shows that the said recognizance was put upon record and became and was, from the eighth day of November, A. D. 1876, a lien upon the property of the said Edward P. Williams, Otis Woodruff, Amos Clark, 2nd, and Richard Kipling, in favor of your orator, and that your orator thereupon acquired a priority over all other creditors of the said four persons, and a right to be paid first out of their or any of their assets and before any other creditors were paid.

And your orator further shows that the said Edward P. Williams, within a day or two after the making of said recognizance, ran away and became a fraudulent, absconding, concealed, and absent debtor, and at the same time was a convicted criminal and a fugitive from justice; and that he has never appeared, according to the condition of the said recognizance, before the said court, but has been continuously absent from the said district and concealed from the officers of the United States and from his
6 sureties, and although great efforts have been made and much money expended to find and take him, he has not yet been found or arrested; wherefore the said recognizance still remains of record, in full force and effect, as of the eighth day of November, A. D. eighteen hundred and seventy-six, and had and still has the full force, operation, and effect of a judgment from that day.

And your orator further shows that a *scire facias* being issued on said recognizance, and judgment entered on the return thereof, your orator sued out an execution, and issued the same to the marshal of the United States for the said district of New Jersey, wherein and whereby he was commanded to make out of the goods and chattels, lands and tenements of which the said Edward P. Williams, Otis Woodruff, Amos Clark, 2nd, and Richard A. Kipling were seized on the eighth day of November, A. D. eighteen hundred and seventy-six, or at any time after that day, the sum of ten thousand dollars, together with interest thereon from that day, and together also with the costs, as in and by the said execution and the

record thereof in the clerk's office of the district court of the United States, at Trenton, in the said district of New Jersey, and ready to
7 be produced as this court may order and direct, will more fully and at large appear.

And your orator further shows that Edward P. Williams was and is the first and principal debtor to your orator upon the said recognizance, and the said Otis Woodruff, Amos Clark, 2nd, and Richard A. Kipling are the sureties of the said Edward P. Williams, and liable to your orator secondarily and after the said Edward P. Williams.

And your orator further shows that the deputy marshal of the United States went to the place of business of Edward P. Williams, in Elizabeth, New Jersey, and attempted to levy upon and take in execution by virtue of the said writ the goods and chattels in the store of the said Edward P. Williams, and elsewhere also other goods to him belonging in the said city, with the lawful intention of making the money due upon the said writ out of the same. But your orator shows that the said deputy marshal was refused admission to the said store in which the goods and chattels of said Edward P. Williams were, and that the defendant Ryder was in possession of the said store and the goods and chattels of Edward P. Williams, and all the other property to him belonging in Elizabeth or elsewhere in New Jersey, so far as the said deputy marshal could learn; and the said Ryder thereupon was served with a true copy of the said
8 execution, and a notice in writing was given to him by the said deputy marshal that your orator claimed a lien and priority upon all the goods and chattels, lands and, tenements of Edward P. Williams by virtue of the said recognizance and execution, and that the lien and priority of your orator was first in order and priority, and before any other claim, or debt, or demand, lien or judgment, or assignment, or attachment whatsoever, and that all of them were under and subject to the priority in payment of the United States as well by reason of the said recognizance, which was made on the eighth day of November, A. D. 1876, and before all other suits were begun against him, and therefore had the force, operation, and effect of a judgment for the said sum of $10,000 (ten thousand dollars), and was notice from that day to the said Ryder and all the people of New Jersey of the facts therein mentioned, as also by reason of the statutes of the United States in such case made and provided, by which all debts due to the United States are especially given priority over all other creditors of the debtor, and the operation of said statutes is expressly extended to all cases of insolvent, absconding, or absent debtors whose property is attached by process of law, as in and by the said stat-
9 utes of the United States, which your orator prays may be made a part of this bill and read therewith, if need be, will more fully and at large appear.

And your orator further shows that notwithstanding these demands and representations the said defendant Ryder refused to permit the levy to be made by the said deputy marshal, and insisted that he held the goods by a paramount title, by virtue of some pretended assignment or attachment, and declared that *that* there were no goods of Edward P. Williams in his hands subject to levy under the execution of your orator.

And your orator further shows that the said Edward P. Williams, on the twenty-seventh day of July, eighteen hundred and seventy-six, by a

deed under his hand and seal of that date, assigned to the defendant Seth B. Ryder, in trust, certain real estate, viz, one-half interest in the store and dwelling-house at the corner of Broad and Jersey streets in the city of Elizabeth, valued over incumbrances at ($10,000) ten thousand dollars; also a house and lot, sixty-five by four hundred (65 x 400), on Morris avenue in Elizabeth, New Jersey, valued over incumbrance at two thousand dollars; also a house and lot on the Rahway road, Linden
10 Township, Union County, New Jersey, one hundred by six hundred (100 x 600), valued over incumbrance at ($300) three hundred dollars; also house and lot, forty by one hundred (40 x 100), in Union street in the *the* city of Elizabeth, valued over incumbrance at ($500) five hundred dollars; and also goods and chattels therein described as follows, viz: The stock in the store of said Edward P. Williams, in the city of Elizabeth, the selling value of which was stated to be fifteen thousand dollars ($15,000); also book debts worth five thousand dollars ($5,000); also furniture worth one thousand dollars ($1,000); also two horses, worth one hundred and fifty dollars ($150); also two wagons and two carriages, worth four hundred dollars ($400); also stock in the Germania Fire Insurance Company and stock in the National Fire and Marine Insurance Company, valued over the amount for which the same was pledged at five hundred dollars ($500), in trust as aforesaid for the use and benefit of the creditors of the said Edward P. Williams, as in and by the record of the said assignment remaining in the clerk's office of Union County, in deed-book No. 110, page 298, &c., will more fully and at large appear.
11 And your orator further shows that the said defendant Ryder afterwards gave a bond, with some sureties to the ordinary of the State of New Jersey, conditioned for the faithful performance of the trusts of said deed, and filed the same in the office of the surrogate of Union County, New Jersey; and your orator is informed that by virtue of this assignment and bond, &c., the said defendant Ryder pretends to have the right to hold and dispose of the said goods and chattels of Edward P. Williams, the absconding and absent debtor, as his assignee, under the statutes of the State of New Jersey in such case made and provided.

Whereas your orator shows and expressly charges that such claim by the said defendant Ryder, as assignee, is illegal and totally unfounded in equity, and that the proceeding of said defendant under the said assignment is illegal and his title as assignee void, because your orator shows the truth to be that all the creditors of the said Edward P. Williams, after the said assignment was made, on or about the day of , eighteen hundred and seventy-six, entered into an agreement of compromise with said
12 Edward P. Williams, in writing, and signed by them, whereby they accepted certain notes, to the amount of forty per cent. of their claims, made by the said Edward P. Williams, and endorsed by certain other persons as sureties for the payment thereof (which other persons or sureties had not been previously liable for any of the said debts of Edward P. Williams, or any part of them, but were new and additional advantages given to the said creditors), and in consideration thereof they, the said creditors, relinquished and released to the said Edward P. Williams the remaining sixty per cent. of their claims, and also their rights under and by virtue of the said assignment to all and any of the goods and chattels, lands and tenements, mentioned therein, as in the and by the said

agreement in writing (which orators prays may be produced by the defendant Ryder, who has possession thereof) will more fully appear.

And your orator shows that in pursuance of this agreement the said endorsed notes were delivered to the said creditors and accepted by them, and the said defendant Ryder thereupon, with the knowledge and consent of the said creditors, surrendered the said goods and chattels, lands and tenements, mentioned in the said assignment, to the said Edward P.
13 Williams, who thereupon, by virtue of the said agreement of compromise, the delivery of the said endorsed notes and the surrender to him by the defendant Ryder, became and was seized and possessed of all the said goods and chattels, lands and tenements in his own right in fee-simple absolutely, and he accordingly actually entered upon and took possession thereof, opened the store in the city of Elizabeth where the goods and chattels had been and were kept, and proceeded to carry on the retail dry-goods business in his own proper name in the same open, public manner in which he had used to carry on the same business in the same premises during over ten years preceeding that time. He sold large quantities of the goods mentioned in the said assignment, and with the proceeds of the sale thereof paid the wages of his clerks and the expenses of his store, supported himself and his family, paid some of the endorsed notes as they matured, bought new goods of various sorts to replenish the stock in his store, and for a considerable time, and during the months of August, September, October, and November, 1876, continuously down to some days after he became indebted of record to your orator, openly, publicly, and notoriously possessed and disposed of the goods and chattels mentioned in the said assignment as the sole and absolute owner thereof,
14 with the knowledge and consent of said defendant Ryder, and also of the creditors of said Edward P. Williams, none of whom began any suits or proceedings against him to recover their debts before the entry of your orator's recognizance.

Your orator shows and expressly charges that on the eighth day of November, 1876, when the said Edward P. Williams became indebted of record to your orator in the sum of ten thousand dollars aforesaid, he was legally seized in fee-simple and actually possessed of all the goods and chattels, lands and tenements, mentioned or included in the said assignment to the defendant Ryder, and that the defendant Ryder had not any right, title, or interest in the same, either vested or contingent, as assignee or trustee or otherwise, nor has he at any time or in any way since that time lawfully acquired any right, title, or interest therein, nor any lawful authority to possess and to dispose of the same.

And your orator further shows that none of the creditors of the said Edward P. Williams ever came in under the said assignment (except one who was immediately paid by Edward P. Williams) and proved their claims against his estate, according to the statute in such case made
15 and provided, so as to entitle them to the benefit of the said assignment or to any dividend of the property of the said insolvent. On the contrary they all (except one as aforesaid, who has been paid by E. P. Williams) wholly neglected so to do, and they have thereby become legally barred of their dividends of the property mentioned in the said assignment, and the said defendant Ryder is no longer bound to hold the said property for their benefit, as he pretends he is bound to do, nor have they

any lien upon or claim to the said goods and chattels, lands and tenements, or the proceeds thereof, but the same belongs wholly to your orator. Some of the said creditors, on the maturity of the said endorsed notes for the forty per cent. aforesaid, have, since the said Edward P. Williams became indebted to your orator of record, proceeded by suits at law in the courts of New Jersey against the endorsers thereof, and have obtained judgments and issued executions thereon, and levied upon and sold the property of the said endorsers for their individual benefit under their executions. Wherefore your orator charges that they ought not in equity to have any dividend of the said insolvent estate, and the said defendant Ryder is no longer in any way liable to them, but is liable only to
16 your orator for the whole of the property aforesaid.

And your orator further shows that on or about the eleventh day of November, A. D. eighteen hundred and seventy-six, the defendant Ryder, the assignee of the said Edward P. Williams, in obedience to the laws of New Jersey, filed with the surrogate of the county of Union, New Jersey, a true list of all creditors of the said Edward P. Williams who had duly claimed to be such within the time required by law, with a true statement of their respective claims, which was duly sworn to and subscribed by the said defendant Seth B. Ryder on the eleventh day of November, eighteen hundred and seventy-six, by which it appears that the only creditor who had proved his claim according to law was Garrett Wyckoff, who claimed the sum of ($2,063.75) two thousand and sixty-three dollars and seventy-five cents, as in and by the said list and oath, on file in the orphans' court of Union County, will more fully and at large appear. Whereas your orator shows and expressly charges that the said Edward P. Williams had some time before absconded, in order to enable him to carry out the aforementioned compromise with his creditors, with the aid and assist-
17 ance of the defendant Ryder, paid off and fully satisfied the said debt of the said Garrett Wyckoff, and received from him, through the said defendant Ryder, as an assignment of it to some friend; but as the money was paid by Edward P. Williams the debt was in fact legally and totally extinguished; and your orator now expressly charges that when the said defendant Ryder made the list of the creditors of Edward P. Williams and filed the same in the orphans' court aforesaid he well knew of his own knowledge that the only creditor named (Garrett Wyckoff) by him in his list was fully satisfied, and had no claim or pretence of claim against the said estate.

And your orator further shows that the said defendant Ryder, on or about the twentieth day of November, A. D. eighteen hundred and seventy-six, made a statement in writing, and duly sworn to by him, and filed the same in the orphans' court of Union County, New Jersey, by which it appears that after his appointment as assignee he made publication for three weeks next succeeding the date of the same, at least once in each week, in the Elizabeth Daily Monitor, and also in the Elizabeth Daily Herald, two newspapers published in the said county of Union, and in the New York Times, a newspaper published in the city of New York, and also in the North
18 American, a newspaper published in the city of Philadelphia, of a notice (a printed copy being affixed to said statement) of the assignment to him, and requiring the creditors of the said Edward P. Williams to exhibit their claims to him, as assignee, within three

months from the assignment; and the said statement further set forth that all the creditors of said Edward P. Williams, as far as the said defendant knew, then lived in the States in which such notices and such newspapers were published; and the said statement further set forth that six weeks next preceeding the twenty-seventh day of October, eighteen hundred and seventy-six he set up five notices in said county of Union, New Jersey, and also five such notices in the city of New York, one at each of the five most public places in each of the said localities, and caused such notices to be published in the Elizabeth Daily Monitor and Elizabeth Daily Herald for six weeks next preceeding the date aforesaid, at least once in each week, such notice (a printed copy of which being affixed to the said statement) calling upon and requiring the creditors of the said Edward P. Williams to file their claims with the said assignee before the twenty-seventh day of October, 1876, being three months
19 from the date of the said assignment, or be forever barred from coming in for a dividend of said estate; and the said statement further set forth that the county of Union and city of New York were the places where a majority of the creditors of said Edward P. Williams resided at the time the advertizement of such notices was made, as in and by the said affidavit or statement under oath of the said defendant Ryder, now remaining on file in the office of the orphans' court of the county of Union, will more fully and at large appear.

And your orator *orator* further shows that on the twentieth day of November the Union County orphans' court made a certain order or decree in the matter of Edward P. Williams aforesaid, which, being brief, your orator, for greater certainty, herein sets forth in full, as follows, viz:

Union County ophans' court.

IN THE MATTER OF SETH B. RYDER, ASSIGNEE }
of Edward P. Williams, an insolvent debtor. }

Proof being made to the court that the assignee above named has given the requisite notices to the creditors of said Williams to bring in their claims befor' him, under oath or affirmation, within three months from such assignment, and that an assignment had been made to him by
20 said Williams for the benefit of creditors under the provisions of the third section of an act entitled "An act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors," approved March 27th, 1874, and that he has also given the due legal notices that all claims of creditors of said Williams must be exhibited against his estate to said assignee, under oath or affirmation, before the twenty-seventh day of October last past, being three months from the date of assignment, or be forever barred from coming in for a dividend of the estate, and also that a list of the creditors of said Williams would be filed with the surrogate of the county of Union, at the time named, under the provision of the fifth section of said act, which notices were given to the creditors by publication and setting up the same according to law:

It is, on this twentieth day of November, eighteen hundred and seventy-six, ordered that the creditors of the said Edward P. Williams who have not within the time named in said notices, to wit, prior to the twenty-

seventh day of October, eighteen hundred and seventy-six, presented their claim to the assignee, under oath or affirmation, be forever barred from a dividend of said estate.

21 (Signed)

ENOS W. RUNYON,
H. H. BOWNE,
GEO. W. FARNHAM,
Judges.

As in and by the said order, now remaining on record in the orphans' court of Union County, will more fully and at large appear.

And your orator further shows that by virtue of the said order all the creditors of the said Edward P. Williams were, and now still remain, barred forever of and from having any dividend of the estate in the hands of said defendant Ryder, and as the creditor, Garrett Wyckoff, has been paid off and satisfied, there is no person save your orator having any right to said estate or any part thereof.

And your orator further shows that on the fifteenth day of November, A. D. eighteen hundred and seventy-six (after the said Edward P. Williams had absconded, and after your orator's recognizance had become forfeited and a lien of record against all his estate for the sum of ten thousand dollars, taking effect from the eighth day of November, A. D. eighteen hundred and seventy-six), one of the creditors of said absconding debtor sued a writ of attachment out of the Union County circuit court,

22 and the same being delivered to the sheriff of said county, he, on the twenty-third day of November, eighteen hundred and seventy-six, levied upon and attached a quantity of goods and chattels in the store of said Edward P. Williams, which are in the said sheriff's return to said writ specifically itemed and appraised at ($1,254.29) twelve hundred and fifty-four dollars and twenty-nine cents; and he also attached the balance of stock (in those words) in said store, the counters, shelving, fixtures, safe, books of account, judgments, &c.; and he also attached four certain pieces of real estate as the property of said Edward P. Williams, the whole appraisement of property levied being twelve hundred and fifty-nine dollars and twenty-nine cents ($1,259.29), and returned the said writ into the Union County circuit court on or about the twenty-seventh day of November, A. D. eighteen hundred and seventy-six, the return day therein named, as in and by the said writ of attachment now remaining upon the files of the said court will more fully and at large appear.

And your orator shows that the sheriff, in making the attachment aforesaid, legally took, levied upon, and appraised only such goods and chattels and such stock in the store of the said Edward P. Williams as

23 had not been mentioned in the assignment in this bill heretofore set forth as conveyed to the defendant Ryder. On the contrary, he carefully refrained from taking those mentioned in said assignment, as appears by a comparison of the assignment aforesaid and his return to said writ, for neither of them contains any legal description or inventory of personal property which is specially included in the other. The stock taken under the attachment had been bought by said Edward P. Williams during the time between the compromise with his creditors hereinbefore mentioned and the eleventh day of November, A. D. 1876, which is the date of his disappearance, and had been paid for out of the proceeds of the

sale of the goods mentioned in the said assignment which had come into his possession under said agreement of compromise.

And your orator shows that no other writ of attachment has been issued against the said Edward P. Williams or his estate, nor has any new or other levy been made by the sheriff or by any other person by order of the court in the proceeding last mentioned upon any other personal property of the said Edward P. Williams or upon the personal property included and described in the said assignment to the defendant Ryder, nor
24 has the said defendant made any return or report of any other property found by him in said attachment.

And your orator further shows that the following persons have filed affidavits in the said attachment proceeding and have entered rules on the records of said court, with a view of being admitted as creditors of the said Edward P. Williams:

Frederick W. Foote, of Elizabeth, N. Jersey, claiming the sum of 31.50.

The National State Bank of Elizabeth, N. Jersey, claiming the sum of 20,722.04.

George J. Cook, John W. Valentine, and Frederick A. Sandland, trading as Cook, Valentine & Co., claiming the sum of 64.69.

William R. Gilbert, Stephen J. Weaver, trading as Gilbert & Weaver, claiming the sum of 88.23.

Joseph C. Alexander, George A. Morrison, and John Herriman, trading as Morrison, Herriman & Co., claiming the sum of 171.60.

J. Daton Winans, claiming the sum of 626.90.

William Judge, James Judge, and Robert Judge, trading as Judge & Bros., claiming the sum of 393.17.

William S. Potter, claiming the sum of 5,275.00.

William A. Tupper, claiming the sum of 516.34.

Charles J. Strauss and Maurice Aronstein, trading as Strauss &
25 Aronstein, claiming the sum of 229.85.

Jean B. Virolet and Jesse Durlach, trading as Virolet & Durlach, claiming the sum of 220.54.

Philo Mills and John Gibb, trading as Mills & Gibb, claiming the sum of 1,932.94.

Thomas J. Hood, James Bonbright, Henry W. Gundacker, John A. Meehan, Andrew C. Sinn, Soloman S. Miller, Uriah G. Fox, and Samuel B. Brown, trading as Hood, Bonbright & Co., claiming the sum of 473.00.

Carlton Ayres, John Rall, William E. C. Bradley, George A. Williamson, and Charles James, trading as Carlton, Ayres & Co., claiming the sum of 137.05.

H. S. Butler, Jonathan J. Broome, Oliver M. Clapp, Charles Walker, John Herberton, and John T. Davis, trading as Butler, Broome & Clapp, claiming the sum of 586.13.

Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter A. Force, and Daniel Robinson, trading as H. B. Claflin & Co., claiming the sum of 5,290.41.

The Rector, Churchwardens, and Vestrymen of St. John's Church in Elizabethtown, N. J., claiming the sum of 448.14.

Keen Pruden, claiming the sum of 1,799.40.

William S. Rolston, claiming the sum of 230.00.

Moses H. Ayres, claiming the sum of 360.00.

26 Moses H. Ayres, administrator of Barzillai Ayres, deceased, claiming the sum of 239.29.

William J. Harris, claiming the sum of 31.26.

James H. Dunham, William T. Buckley, Thomas A. Painter, Walter Fletcher, Herman Chapin, Charles H. Webb, and Edward A. Ranney, trading as Dunham, Buckley & Co., claiming the sum of 482.50.

Albert L. Eastman, Milu P. Dayton, Samuel G. Gardner, jr., and Alden B. Bigelow, trading as Eastman, Bigelow & Dayton, claiming the sum of 360.40.

Henry H. Statesburg, trustee in bankruptcy of Emery Ivey & Lee, the plaintiffs in the said attachment.

Henry W. Williams, who claimed rent for one-half of the said store.

As by the records and files of the said attachment will more fully and at large appear.

And your orator shows and expressly charges that the said applying creditors ought not to have any share of the fund in the auditor's hands, because they all accepted and still hold the notes aforesaid, with the endorsers thereon, as security for their claims.

27 And your orator shows that afterwards, by an order of the said Union County circuit court made on the second day of December, A. D. eighteen hundred and seventy-six, the defendant Seth B. Ryder was appointed the auditor in said attachment, as by the said order on the minutes of the said court will more fully and at large appear. And on the same day the said Union County circuit court further, by an order for that purpose made, directed the said Seth B. Ryder, assignee, to sell all the said stock of goods in said store as perishable property, as by the said order on the minutes of said court will more fully and at large appear.

And your orator shows and expressly charges that the said defendant Ryder pretends to hold the whole or some of the property of Edward P. Williams, and the proceeds thereof, by virtue of the above-mentioned appointment as auditor and the said order to sell, and that he refuses to deliver and pay the same or any part thereof to your orator's marshal to satisfy your orator's judgment aforesaid, and at times he pretends that the creditors in said attachment proceeding are entitled to the property levied upon under said writ. Whereas your orator shows and expressly charges that your orator's priority is first and before any other creditor whatever, because Edward P. Williams became indebted to your orator on the

28 8th November, eighteen hundred and seventy-six, and your orator's judgment took effect on the eighth day of November, A. D. eighteen hundred and seventy-six, and your orator's execution was a lien upon the property of the said Edward P. Williams before the writ of attachment was levied by the sheriff of Union County, which was not until the twenty-third day of November, eighteen hundred and seventy-six, and the said levy by the said officer could not in any way destroy or defeat the priority of either the indebtedness due your orator or your orator's judgment; and as a further cause for your orator's priority over all other creditors your orator shows that by the statutes of the United States it is expressly provided that whenever any person indebted to the United States is insolvent the debts due to the United States shall be first satisfied, and that the priority thereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary

assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as by the said statutes will more fully appear.

And your orator shows that the said Edward P. Williams was
29 and now is insolvent, and was and now is indebted to your orator, and was and now remains an absconding, concealed, and absent debtor, and that therefore, by the manifest effect of the said statute, in obedience thereto, your orator's debt should be first satisfied out of the property of the said debtor which has been attached by process of law, the proceeds of which the said defendant Ryder now holds. And at other times the said defendant Ryder pretends that the creditors coming in under the said assignment are entitled to the proceeds of the said goods assigned to him (which it appears he has sold, as assignee, under a void order made by the Union County circuit court, while the whole control and jurisdiction over the said proceedings under the assignment is vested by law in the orphans' court of Union County).

Whereas your orator shows, as heretofore set out in this bill, that all the creditors of said E. P. Williams have been forever barred of any dividend of his estate by a decree of the propor court, and have also either been paid in full or by the said compromise and the accepting of said endorsed notes, or have by their own agreement as aforesaid forfeited their rights under said assignment of any dividend of his estate, and
30 also that by virtue of the statutes of the United States aforesaid your orator's judgment is entitled to be first satisfied out of the property included in said assignment, because the said Edward P. Williams, not having sufficient property to pay all his debts, made a voluntary assignment of his estate, so that your orator is entitled to have the proceeds as well of the property included in the assignment aforesaid as the proceeds of the property attached as aforesaid appropriated to the satisfaction of your orator's judgment, and the persons whom the said defendant Ryder represents have only such rights as under and subject to your orator's.

And your orator further shows that the said defendant Ryder, notwithstanding the service of said execution on him by the deputy marshal, and the notice served upon him as aforesaid, continued to hold possession of the property of Edward P. Williams. He collected the rents and profits of the lands and tenements mentioned in the said assignment, recovered some of the book debts aforesaid and took the money arising therefrom, sold the goods and chattels, furniture, horses, wagons, and carriages, and the stock in the store mentioned in said assignment, and took and appropriated the stock in the insurance companies aforesaid; and he has sold the
31 stock in said store, the counters, shelving, fixtures, safe, &c., described in the sheriff's return to said writ of attachment, and collected book debts and judgments therein also mentioned, and from the property of various sorts in said assignment and in said sheriff's return has accumulated in his hands a large sum of money, amounting to thousands of dollars, which he now continues to hold and refuses to pay to your orator or the deputy marshal in satisfaction of said execution, as he ought in law and in equity and in good conscience to do.

And your orator further shows that at the last term of the court, held in October, 1877, in Union County, Henry W. Williams filed an affidavit

and moved the court for an order upon the said defendant Ryder that he pay the rent due by Edward P. Williams for the store aforesaid out of the money in his hands. Whereupon the said defendant Ryder, by his counsel, then and there pleaded in said court, in opposition to the said motion, that he ought not to be directed to pay any of the said money, because, as said counsel stated, your orator, the United States of America, had given him a notice that your orator claimed all the funds in his hands by virtue of the
32 lien and priority of your orator therein over all and any other creditor or creditors of said Edward P. Williams, and the said counsel also pleaded that in case any such order as then prayed should be made by that court, and the said defendant Ryder should in obedience thereto pay any money thereon, he would be held, by virtue and authority of the statute of the United States in that case made and provided afterwards liable to pay such sum to your orator out of his own proper estate, notwithstanding such order of that court. Whereupon the said court considered that the order applied for ought not to be made, and the motion therefor was denied.

Your orator shows and expressly charges that it is manifestly contrary to equity and good conscience that the defendant Ryder shall continue to hold the said funds of said estate, and while refusing to pay them to your orator seek to avoid paying other claimants, upon the plea of his personal liability to your orator for the same and your orator's priority of right and title thereto.

And your orator further shows that by reason of the said fraudulent and invalid assignment, and of the said attachment and the proceedings taken under the same as aforesaid, the marshal of the United States
33 has been wholly prevented from levying upon or obtaining possession of any of the real or personal property of the said Edward P. Williams, and the said execution remains wholly unsatisfied, and would have been so returned by the marshal but for the fact that the sureties of the said Williams were possessed of certain real estate upon which a levy has been made, but which is, as your orator is informed, wholly insufficient to satisfy the said execution.

And your orator further shows that the said sureties, being aware that the said Seth B. Ryder has in his hands a large amount of money belonging to their principal and subject to the statutory claim of your orator to priority as aforesaid, have claimed, as a right belonging to them as sureties, that your orator before selling their lands under said execution should seek relief in this court to compel the said Seth B. Ryder to apply the said fund to the satisfaction of said execution, as he is bound to do by the statute, giving your orator a priority upon said fund, in order that the said moneys of their principal in the hands of said Ryder may be applied to your orator's claim in exoneration of the said sureties, so far as the same will extend.

And your orator further shows that the said Seth B. Ryder, as the assignee of said Williams, and as auditor in attachment as aforesaid,
34 holds the said funds as a trustee for your orator, and is bound by the statutes giving priority to your orator to account for the same to your orator, and to apply the same to the payment of the amount due on said recognizance, and ought to be compelled to make such account and application by the decree of this honorable court.

In consideration of the premises, and forasmuch as your orator is with-

out relief under the strict rules of the common law, and can only obtain the same in a court of equity, your orator prays that the said defendant Seth B. Ryder be ordered to account for the rents, issues, and profits of the lands and tenements of Edward P. Williams which have come into his hands, and for the goods and chattels of the said Edward P. Williams in his possession or custody, or the proceeds of the sale thereof which have been received or which should have been received by him or for which he is responsible, and that it be referred to a suitable person to take and state an account of the same, and to report the amount of money which the said Seth B. Ryder has received therefrom, and what, if anything, he has lawfully expended and the amount remaining in his hands; and that the said Seth B. Ryder be ordered to pay the sum for which he
35 may be responsible into this court to the credit of this suit, to be there disposed of under the direction of this court, together with your orator's costs; and that the said Seth B. Ryder be forthwith, by your orator's writ for that purpose to be issued, enjoined from paying any of the money in his hands arising from the property of Edward P. Williams to any person or persons, corporation or corporations, until the further order of this court, and from taking any action, either as assignee or auditor of the estate of Edward P. Williams, in or under either of the proceedings in the courts of New Jersey; and that this court may make such further order and decree finally settling the rights of all the parties to this suit as may seem proper, and that a subpœna issue out of this court to the defendants, Seth B. Ryder, Edward P. Williams, Frederick W. Foote, the National State Bank of Elizabeth, New Jersey, George J. Cook, John W. Valentine, and Frederick A. Sandland; William R. Gilbert and Stephen J. Weaver; Joseph C. Alexander, George A. Morrison, and John Herriman; J. Dayton Winans, William Judge, James Judge, and Robert Judge; William S. Potter, William A. Tupper, Charles J. Strauss, and Maurice Aronstein; Jean B. Virolet and Isaac Durlach; Philo Mills and
36 John Gibb; Thomas J. Hood, James Bonbright, Henry W. Gundacker, John A. Meehan, Andrew C. Sinn, Samuel M. Kelly, Soloman S. Miller, Uriah G. Fox, and Samuel B. Brown; Carlton Ayres, John Rall, William E. C. Bradley, George A. Williamson, and Charles James; H. L. Butler, Jonathan J. Broome, Oliver M. Clapp, Charles Walker, John Herberton, and John T. Davis; Horace B. Claflin, John Claflin, Edward E. Eermes, Horace J. Fairchild, William S. Dunn, Dexter N. Force, and Daniel Robinson; the Rector, Churchwardens, and Vestrymen of St. John's Church in Elizabethtown; Keen Pruden, William S. Rolston, Moses H. Ayres; Moses H. Ayres, administrator of Barzillai Ayres, deceased; William J. Harris, James H. Dunham, William T. Buckley, Thomas A. Painer, Walter Ftletcher, Herman Chapin, Charles H. Webb, and Edward A. Ranney; Albert L. Eastman, Milu P. Dayton, Samuel G. Gardner, and Alden B. Bigelow; Henry H. Statesburg, trustee in bankruptcy of Theodore Emery, and Henry Ivey, and George C. Lee; Henry W. Williams, commanding them and each of them, at a certain time and under a certain penalty therein to be expressed, personally to appear before your honors in this honorable court, and then and there full, true, direct, and perfect answers make to all and singular the
37 premises, and to stand to, abide, and perform such order and decree

therein as to your honors shall seem meet or as shall be agreeable to equity and good conscience.

A. Q. KEASBEY,
U. S. Dist. Att'y, Sol. & of Counsel with Compl't.

38 *Demurrer of Seth B. Ryder.—Filed January* 31, 1878.

UNITED STATES OF AMERICA,
District of New Jersey:

BETWEEN THE UNITED STATES OF AMERICA, complainant, *and* SETH B. RYDER AND OTHERS, DEFENDANTS. } In equity. On bill.

The demurrer of Seth B. Ryder, one of the defendants to the bill of complaint of the United States of America, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainant in and by its said bill hath not made or stated such a case as doth entitle it to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

Wherefore this defendant demands the judgment of this honor-
39 able court whether he shall be compelled to make any further or abler answer to the said bill or to any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs on this behalf sustained.

JOHN R. EMERY,
Solicitor and of Counsel with Seth B. Ryder.

I hereby certify that I have read and examined the bill of complaint filed in the above-stated cause, and that in my opinion the above demurrer is well founded in point of law.

JOHN R. EMERY,
Of Counsel with Demurrant.

UNITED STATES OF AMERICA,
District of New Jersey, ss:

Seth B. Ryder, the defendant above named, being duly sworn according to law, on his oath says that the above demurrer is not interposed for delay.

S. B. RYDER.

Sworn and subscribed this 26th day of January, A. D. 1878, before me.
HOWARD RICHARDS,
United States Commissioner.

40 *Demurrer of State National Bank.—Filed January* 31, 1878.

United States circuit court, district of New Jersey. In equity.

BETWEEN THE UNITED STATES OF AMERICA, complainant, *and* SETH B. RYDER AND OTHERS, DEFENDANTS. } On bill.

The demurrer of the State National Bank of Elizabeth, New Jersey, to the bill of complaint of the United States of America, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainant in and by its said bill hath not made or stated such a case as doth entitle it to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

41 Wherefore this defendant demands the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, or to any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

JOHN R. EMERY,
Solicitor and of Counsel with Demurrant.

I hereby certify that I have read and examined the bill of complaint filed in the above-stated cause, and that in my opinion the above demurrer is well founded in point of law.

JOHN R. EMERY,
Of Counsel with Demurrant.

UNITED STATES OF AMERICA,
District of New Jersey, ss:

Augustus C. Kellogg, of said State, being duly sworn according to law, on his oath says that he is cashier of the State National Bank of Elizabeth, New Jersey, the defendants above named, and is authorized to file the above demurrer on their behalf, and that the same is not interposed for delay.

A. C. KELLOGG.

Sworn and subscribed this 26th day of January, A. D. 1878, before me.

HOWARD RICHARDS,
United States Commissioner.

42 *Demurrer of Henry W. Williams.—Filed February 4, 1878.*

United States circuit court, district of New Jersey.

BETWEEN THE UNITED STATES OF AMERICA, complainants,
and
SETH B. RYDER AND OTHERS, DEFENDANTS.

The demurrer of Henry W. Williams, defendant, to the bill of complaint of the United States of America, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in and by the said bill set forth and complained of to be true in manner and form as the same are therein and thereby set forth and alleged, saith that he is advised by his counsel that there is no matter or thing in the said bill contained good and sufficient in law to call this defendant in question in this honorable court for the same, but that there is good cause of demurrer thereunto, and therefore this defendant doth demur thereunto, and for cause of demurrer this defendant saith that the said bill of complaint (in case the allegations therein contained were true, which this defendant doth in no sort admit) con-

43 tains not any matter of equity wherein this court can ground any decree or give the complainant any relief or assistance as against this defendant.

Wherefore, and for divers other errors and imperfections in the said bill appearing, this defendant doth demur in law thereunto, and humbly demands the judgment of this honorable court whether he shall be compelled to put in any further or other answer to the said bill, and humbly prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

EDWARD S. ATWATER,
Solicitor and of Counsel with Henry W. Williams.

SOUTH. DIST. OF NEW YORK,
State of New York, County of New York:

Henry W. Williams, of full age, being duly sworn according to law, on his oath saith that the foregoing demurrer is not interposed for delay.

HENRY W. WILLIAMS.

Sworn and subscribed before me this 1st day of February, A. D. 1878.
[L. S.] JOHN A. SHIELDS,
U. S. Commissioner.

44 I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD S. ATWATER,
Of Counsel with Demurrant.

45 *Decree.—Filed October 5, 1880.*

United States circuit court, district of New Jersey.

THE UNITED STATES OF AMERICA
vs.
SETH B. RYDER, EDWARD P. WILLIAMS, Frederick W. Foote, The National State Bank of Elizabeth, New Jersey; George J. Cook, John W. Valentine, and Frederick A. Sandland; William R. Gilbert, and Stephen J. Weaver; Joseph C. Alexander, George A. Morrison, and John Herriman; J. Dayton Winans, William Judge, James Judge, and Robert Judge; William S. Potter, William A. Tupper, Charles J. Strauss, and Maurice Aronstein; Jean B. Virolet, and Isaac Durlach; Philo Mills, and John Gibb; Thomas J. Hood, James Bonbright, Henry W. Gundacker, John A. Meehan, Andrew C. Sinn, Samuel M. Kelly, Soloman S. Miller, Uriah G. Fox, and Samuel B. Brown; Carlton Ayres, John Rall, William E. C. Bradley, George A. Williamson, and Charles James; H. L. Butler, Johnathan J. Broome, Oliver M. Clapp, Charles Walker, John Herberton, John T. Davis, Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, and Daniel Robinson; The Rector, Churchwardens, and Vestrymen of St.
46 John's Church in Elizabethtown; Keen Pruden, William S. Rolston, Moses H. Ayres, Moses H. Ayres, administrator of Barzillai Ayres, deceased, William J. Harris, James H. Dunham, William T. Buckley, Thomas A. Painter, Walter Fletcher, Herman Chapin, Charles H. Webb, and Edward A. Ranney; Albert L. Eastman, Milu P. Dayton, Samuel G. Gardner, and Alden B. Bigelow; Henry H. Statesburg, trustee in bankruptcy of Theodore Emery, Henry Ivey, George C. Lee, and Henry W. Williams.

This cause coming on to be heard in this court, in the city of Trenton, at the April term, in the year eighteen hundred and seventy-eight, in the presence of A. Q. Keasbey, esq., district attorney, the solicitor of the United States of America, and William J. Magie and H. Richards, of counsel, and of John R. Emery, solicitor and of counsel for the demurrants Seth B. Ryder and the National State Bank of Elizabeth, and of Edward S. Atwater, solicitor and of counsel for the demurrant Henry W. Williams; and the bill of complaint and the demurrers having been read, and the arguments of counsel having been heard and considered, and

the court having taken time to advise thereon, and being of the opinion that the said demurrers are sufficient:

And now, on this fifth day of October, in the year eighteen hundred and eighty, it appearing to the court that the United States of
47 America, the complainants, are not entitled to the relief sought and prayed for in and by the said bill of complaint, it is ordered, adjudged, and decreed that the complainant's said bill be, and the same is hereby, dismissed without costs.

JNO. T. NIXON, *J.*

48 United States circuit court, district of New Jersey.

I, S. D. Oliphant, clerk of the United States circuit court in the third circuit, in and for the district of New Jersey, do hereby certify the foregoing to be a true transcript of the record and proceedings in said-entitled suit, as fully as the same remain on file and of record in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, at Trenton, in said district, this ninth day of October, A. D. 1880.

[SEAL.] S. D. OLIPHANT, *Clerk.*

(Indorsement on cover:) No. 156. The United States, appellant, vs. Seth B. Ryder, Edward P. Williams, et al. New Jersey C. C. U. S. Filed 18th October, 1880.

110-729

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 156.

THE UNITED STATES, Appellant,

vs.

SETH B. RYDER, EDWARD P. WILLIAMS et al.

Appeal from the Circuit Court for the District of New Jersey.

Brief for Appellant in Behalf of Otis Woodruff, Amos Clarke, 2d, and Richard A. Kipling, Sureties of Defendant Edward P. Williams.

J. HUBLEY ASHTON,
Of Counsel.

THOMAS McGILL & CO., PRINTERS, WASHINGTON, D.C.

Supreme Court of the United States.

October Term, 1833.—No. 156.

THE UNITED STATES, APPELLANT,

vs.

SETH B. RYDER, EDWARD P. WILLIAMS, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Brief for Appellant in Behalf of Otis Woodruff, Amos Clark, 2nd, and Richard A. Kipling, Sureties of Defendant Edward P. Williams.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the Court below, dismissing upon general demurrer a bill in chancery exhibited by the United States to establish its right of priority of payment out of the property of one Edward P. Williams, an insolvent debtor of the United States, and recover the proceeds of his property in the hands of one Seth B. Ryder, claiming them as assignee of Williams and auditor in certain attachment proceedings instituted against him as an absconding debtor.

Williams had been convicted of a crime in the District

Court of the United States for the District of New Jersey; and on the 8th of November, 1876, he and three other persons, viz., Otis Woodruff, Amos Clark, 2d, and Richard A. Kipling, as his bail entered into a recognizance in the sum of $10,000 for his appearance before that Court to submit to sentence, (p. 2, folio 5.)

Williams absconded a few days afterwards; the recognizance was forfeited for his non-appearance; and the United States obtained judgment and issued execution against the recognizors, (p. 2, folio 6.)

By the execution the marshal was commanded to make out of the goods and lands of which Edward P. Williams, Otis Woodruff, Amos Clark, 2d, and Richard A. Kipling were seized on November 8, 1876, or at any time after that date, the amount of the recognizance, (p. 2, folio 6.)

The marshal, under this writ, levied upon the real estate of the sureties, (p. 12, folio 33.)

He also attempted to levy upon and take in execution the goods and chattels of Williams in his store in the city of Elizabeth, and other goods belonging to him in that city; but he was refused admission to the store by one Seth P. Ryder, who was in possession of the store and the property therein, and all other property belonging to Williams in Elizabeth, or elsewhere in New Jersey, so far as the marshal could learn, (p. 3, folio 7.)

The marshal thereupon served upon Ryder a copy of the execution and a written notice that the United States claimed a lien and priority upon all the property of Williams by virtue of the recognizance and execution, (p. 3, folio 8.)

Ryder, notwithstanding, refused to permit the levy to be made, and insisted that he held the goods by a paramount title, by virtue of some assignment or attachment, and declared that there were no goods of Williams in his hands subject to levy under the execution of the United States, (p. 3, fol. 9.)

It was believed and claimed by the sureties, in view of the facts disclosed by the bill in this case, that the statutory right of priority of the United States had attached to the property of Williams in the hands of Ryder; that he was a trustee for the United States and bound to pay their debt out of the property or its proceeds; and that the United States, before selling the lands of the sureties, under the execution, should institute proceedings to enforce their rights in respect to the funds in Ryder's hands, (p. 12, fol. 33.)

In this view the present bill was filed by the learned attorney of the United States for the District of New Jersey, in the name of the United States, against Williams and Ryder and certain alleged creditors of the former.

General demurrers to the bill were interposed by Ryder and other defendants, which were sustained by the Court below, and on the 5th of October, 1880, a final decree was entered dismissing the bill, (p. 17,) from which the present appeal was taken by the United States, (p. 1.)

It is stated in the brief of the learned counsel for the appellees that after the demurrers were sustained the whole amount of the judgment on the recognizance was paid by the bail.

That is true; but it is respectfully insisted and will be maintained here, on behalf of the bail, that having paid this debt they are entitled to be *subrogated* to all the rights of the United States, as creditors of Williams, in respect of the debt and the property or fund here in controversy, and to the benefit of this suit for the enforcement of those rights, in order to obtain indemnification from the principal debtor for the loss they have been compelled to sustain.

It is probable that this bill will need amendment to meet the present actual situation of the matter involved,

and we will respectfully ask the Court, if a substantial case for relief on behalf of the bail shall appear to be made by the bill, that the decree may be reversed, and the cause remanded with directions to allow such amendments to the bill, by making new parties, or otherwise, as may be necessary to accomplish the present objects of the suit.

The principal facts constituting the ground for relief against the funds in the hands of Ryder, in addition to those mentioned, are these:

1. Williams was and is insolvent, and an absconding, concealed, and absent debtor, (p. 11, fol. 29.) He disappeared on November 11, 1876, three days after the entry of the recognizance, (p. 8, fol. 23,) and became a fugitive from justice and was a convicted criminal, (p. 2, fol. 5.)

2. He was the principal debtor and Otis Woodruff, Amos Clark, 2d, and William A. Kipling were his sureties upon the recognizance, (p. 3, fol. 7.)

3. On July 27, 1876, Williams, not having sufficient property to pay all his debts, (p. 11, fol. 30,) made an assignment, under the Act of the State of New Jersey of March 24, 1874, of certain real and personal property in the City of Elizabeth and elsewhere in New Jersey to the defendant, Seth B Ryder, in trust for his creditors, (p. 4, fol. 10.)

Part of this property consisted of the stock of goods in his store in Elizabeth, where he carried on the retail dry-goods business, (p. 5, fol. 13.)

The value of the real estate is stated in the assignment to be $7,800; that of the personal property, $22,050.

4. Before the entry of the recognizance Williams settled with his creditors in the manner stated in the bill.

One of the creditors, Garrett Wyckoff, was paid in full, (p. 6, fol. 17.)

The others entered into an agreement of compromise, in

writing, whereby they accepted certain notes to the amount of forty per cent. of their claims, made by Williams and endorsed by certain other persons as sureties for the payment thereof, (which other persons had not been previously liable for any of the debts of Williams,) and in consideration thereof they relinquished and released to Williams the remaining sixty per cent. of their claims, and also their rights under and by virtue of the said assignment to all and any of the property therein mentioned, (p. 4, fol. 12.)

5. Ryder, upon the acceptance and delivery of the endorsed notes, with the knowledge and consent of the creditors, surrendered the property mentioned in the assignment to Williams, who was in possession and control of it at the time the recognizance was entered, (p. 5, fol. 13.)

He sold large quantities of the goods in his store in Elizabeth, mentioned in the assignment, and with the proceeds paid some of the endorsed notes as they matured, and bought new goods to replenish the stock in his store. (Ib.)

6. On November 11, 1876, Ryder filed with the Surrogate of Union county, New Jersey, a list of the creditors of Williams who had duly claimed to be such within the time required by law, showing that the only creditor who had proved his claim according to law was Wyckoff, whose debt had been satisfied, as Ryder knew, (p. 6, fol. 16.)

On November 20, 1876, the Union County Orphans' Court passed an order that the creditors of Williams who had not prior to October 27, 1876, presented their claims to the said assignee be forever barred of a dividend of the said estate of Edward P. Williams, an insolvent debtor, (p. 7, fol. 20.)

7. On the 15th of November, 1876, one of the creditors of Williams issued out of the Union County Circuit Court a writ of attachment against him as an absconding

debtor; and, on November 23, 1876, the sheriff levied upon and attached a quantity of goods and chattels in his store (appraised at $1,254.29;) also the balance of stock in said store, fixtures, books of account, judgments, &c.; also four certain pieces of real estate as his property; the whole appraisement of the property levied upon being $1,259.29. (p. 8, fol. 22.)

8. The stock taken under the attachment had been bought by Williams during the time between the said compromise with his creditors and the 11th of November, 1876, the date of his disappearance, and had been paid for out of the proceeds of the sale of the goods mentioned in the said assignment, (p. 8, fol. 23.)

9. The sheriff, in making the attachment, took, levied upon, and appraised only such goods and chattels, and such stock in the store of Williams as were not mentioned in the assignment to Ryder. (Ib.)

10. All the parties who have come in under the said attachment proceedings with the view of being admitted as creditors of Williams, were settled with in the manner above mentioned, and hold their security, (p. 10, fol. 26.)

11. By order of the Union County Circuit Court of December 2, 1876, Ryder was appointed Auditor in the said attachment proceedings.

12. On the same day the said Union County Circuit Court directed Ryder, *Assignee*, to sell all the said stock of goods in said store as perishable property, (Ib.)

13. He has sold the stock in said store and other personal property described in the Sheriff's return to the said attachment, and collected book debts and judgments therein mentioned, (p. 11, fol. 31.)

14. He has also sold, as assignee, (p. 11, fol. 29,) the stock in the store, and other personal property, mentioned in said assignment, and collected the rents and profits of the real estate therein described, (p. 11, fol. 30.)

15. He has accumulated and holds a large sum of money

from the property of various sorts mentioned in the said assignment, and in the Sheriff's return to said attachment, which he refused to pay to the United States in satisfaction of the execution, (p. 11, fol. 31.)

The bill charged that Ryder, as the assignee of Williams, and auditor in the attachment, held the said funds as trustee for the United States, and was bound by the statutes giving priority to them to account for the same to the United States, and apply the same to the payment of the amount due on the recognizance, (p. 12, fol. 34.)

Assignment of Errors.

The Circuit Court erred:

1. In sustaining the demurrers to the bill filed by Seth B. Ryder, the State National Bank of Elizabeth, New Jersey, and Henry W. Williams.

2. In adjudging that the United States were not entitled to the relief sought by the bill in this case.

3. In dismissing the bill.

ARGUMENT.

First.

The novel theory propounded in the Brief for the appellees that the bail in a recognizance for the appearance of a defendant in a criminal proceeding, are not entitled upon being compelled to pay the debt to indemnity from the principal, is without the support of any authority in this country or in England.

1. Petersdorff on *Bail* (page 517) contains this passage:

"It has been remarked that if the bail have been compelled to pay the penalty, in consequence of the recognizance becoming forfeited, that they cannot sustain an action against him for money paid to his use; but this opinion would appear to be unfounded, as it is now fully settled

that where a person is bail for another, he is entitled to recover all the expenses he has incurred, incidental to that situation."

Again this author states (page 423):

"But as soon as this disbursement has been made, the bail may maintain an action of *indebitatus assumpsit* against the principal for money paid for the recovery of such sums, as they from their situation as bail have been fairly and necessarily obliged to expend."

The authority cited for this doctrine by *Petersdorff* is *Fisher* v. *Fallows*, (5 Esp., 171,) where Lord Ellenborough said:

"The relation of principal and bail is this: the principal engages to indemnify the bail from all expenses fairly arising from his situation as bail. The indemnity goes against all charges which are necessary to secure themselves. The bail have a right to surrender their principal in their own discharge, and for their own security. If, therefore, the principal absconds, so that he cannot be had, the bail may take every necessary and proper step to secure him."

It was accordingly held, in that case, that a surety in a criminal recognizance was entitled to recover, from the principal, in assumpsit, the amount of the charge of a person sent by him to secure and take the principal, in order that he might surrender him in discharge of himself and the other bail.

The authorities in this country do not countenance the notion that a criminal recognizance is any exception to the general rule of implied indemnity to the surety for any payment which the latter may make to the creditor in consequence of the liability assumed.

In *Simpson* v. *Roberts*, (35 Georgia, 183,) where a mortgage given by a principal to his bail, to indemnify him against loss on account of his liability in case of forfeiture, was held to be valid, Lumpkin, C. J., said:

"It is alleged that the mortgage lien, given by Simpson,

to Willsford, is void, and could vest no title in the latter, which he could transfer to Roberts and wife; and this because it is contrary to public policy to allow a party to substitute a property security to enable him to escape an offence. We are not prepared to sustain this doctrine. That a principal should, in case of default, not indemnify his bail against the effects of his forfeiture, has never been doubted by any body, and no authority is offered to support the proposition."

In *Reynolds* v. *Harral*, (2 Strobhart [So. Car.] 87,) it was held that the surety in a recognizance was no exception to the general rule that the principal shall refund to his surety any payment he may have been compelled to make in consequence of the default of the principal.

"No practical mischief," said the Court, "can result from allowing bail in a recognizance the same indemnity which is allowed to bail in civil cases; and no case has been found in which any distinction is made in this respect between them."

2. The English cases referred to in the Brief on the other side decide no such proposition as is contended for by the appellees.

The point decided in *Jones* v. *Orchard* (16 C. B., 614) is stated in the syllabus thus: "A entered into a recognizance of bail for B on the removal by certiorari of an indictment for conspiracy from the Central Criminal Court to the Queen's Bench. B was convicted and the recognizance escheated for the non-payment of the prosecutor's costs: *Held*, that A might maintain an action against B as upon an implied indemnity."

The Court said, "An express contract to indemnify against costs would not be illegal, and consequently there can be no reason why the law should not imply an indemnity under the circumstances."

The case in which it is said by the appellees the point

made by them was expressly decided, is *Cripps* v. *Hartnoll*, (4 Best & Smith, 414.)

The question there was simply as to the Statute of Frauds—and the point decided was that where a person, at the request of *another*, enters into a recognizance of bail for the appearance of a *third* to answer a criminal charge, this is not "a special promise to answer for the debt, default, or miscarriage of another," within the fourth section of the statute of 29 Car. 2, c. 3.

The promise there was by a *stranger* to the recognizance.

The difficulty, in *Cripps* v. *Hartnoll*, arose out of the decision in *Green* v. *Cresswell*, (10 A. & E., 453,) in which it had been held by the Queen's Bench that where the plaintiff became bail for another, in a civil suit, at the request of the defendant, in consideration of the defendant's promising to indemnify the plaintiff against the consequences, no action lay on defendant's promise, as it was not in writing.

It was argued by Mr. James for the plaintiff, in *Cripps* v. *Hartnoll*, that the decision in *Green* v. *Cresswell* could not be supported; and it would clearly seem that the Exchequer Chamber in *Cripps* v. *Hartnoll* agreed with him; but to avoid expressly overruling *Green* v. *Cresswell* a distinction was drawn between a promise to indemnify bail in a civil proceeding and a similar promise to indemnify bail in a criminal case, upon the ground stated by Pollock, C. B., that "it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an *indemnity*," and that a mere promise of indemnity was well settled not to be within the Statute of Frauds.

Second.

The bail in this case having paid the debt became thereby subrogated for the purposes of their indemnification to all

the rights and remedies of the United States in respect of the debt against Williams, including the statutory right of priority of payment out of the funds in the hands of Ryder.

1. Nothing, of course, is better settled than the right of a surety to subrogation upon payment of the debt to all the rights, remedies, equities, securities, liens, and priorities which the creditor holds against the principal debtor, or as a means of enforcing payment from him. (Notes of Hare and Wallace to *Dering* v. *Earl of Winchelsea*, 1 Leading Cases in Equity, part I, 134–188.)

This Court, at an early day, adopted the most enlarged view of this equity, holding that, under the statute of Virginia, giving to debts due on protested bills the rank of judgment debtors, a joint indorser, who paid more than his proportion of the debt, had the right to satisfaction out of the assets of his co-debtor with the *priority of a judgment creditor*. (Lidderdale's Exs. *v.* Robinson, 12 Wh., 596.)

Johnson, J., in that case said:

"We find the court of equity lending its aid to compel the creditor to assign the cause of action, and thus to make an actual substitution of the sureties so as to perfect their claim at law. This fully affirms the right to succeed to the legal standing of their principal; and, after establishing that principle, it is going but one step further to consider that as done which the surety has a right to have done in his favor, and thus to sustain the substitution without an actual assignment. And accordingly we find the *dictum* expressed in *Robinson* v. *Wilson*, 2 Madd., 434, in pretty general terms, 'that a surety who pays off a specialty debt shall be considered as a creditor by specialty of his principal.'"

It is now generally settled in this country that a judgment against the principal and surety does not extinguish the relation between them; that when the judgment is paid by the surety, or one who stands in the relation of a surety, it is not discharged, but the payment operates in itself as

an assignment in equity of the debt and of the judgment, which may be used by the surety to recover the money from the principal; and that the surety will be subrogated to all liens and all legal proceedings which the creditor had for the recovery of the debt or the enforcement of the judgment. In favor of the surety the payment is in the nature of a *purchase* by the surety from the creditor, and the debt and all its obligations and incidents are considered as still subsisting, although the remedy may be extinguished and the security discharged as respects the creditor. (See the cases collected in Sheldon on Subrogation, secs. 135 *et seq.*; Lathrop's Appeal, 1 Barr, 517; Fleming *v.* Beaver, 2 Rawle, 132; Lewis *v.* Palmer, 28 N. Y., 201; Norwood *v.* Norwood, 2 H. & J., 238; Watts *v.* Kinney, 3 Leigh, 272, 294; Matthews *v.* Aiken, 1 Comstock, 600.)

The right of subrogation is wholly independent of the consent or agreement of the party against whom it is enforced. It is not confined to cases of suretyship, and exists whenever the *circumstances* are such as to vest the property in the debt in him who seeks to be subrogated; and this occurs where a party is compelled to pay a debt in order to protect his own interests. (Peyton *v.* Smith, 5 Pet., 483.)

The guarantor of a debt, at the instance of the obligee, will have the *rights of a surety*, including that of subrogation, against the obligor, although he assumed the obligation without his knowledge or consent. (Matthews *v.* Aikin, 1 Comstock, 600.)

Where the payment by a *third* person is meant as a purchase and not as an extinguishment of the debt, he will stand in the position of an assignee, and be entitled to use all the remedies of the creditor, even when the transaction has been solely between themselves, and without the participation of the debtor. (Carter *v.* Jones, 5 Iredell, 193; Elkington *v.* Newman, 8 Harris, 281.)

2. It has been expressly and frequently recognized as a general equity that where the Government is entitled to *priority* in the payment of a debt, a surety who pays the debt is entitled to the same preference over the other creditors of the principal, which the Government had. (Hunter *v.* U. S., 5 Peters, 173, 182; S. C., 5 Mason, 62, 65; Deas *v.* Bouchaud, 10 Paige, 445; S. C., 3 Edwards, 485; Enders *v.* Brune, 4 Randolph, 438; Richardson *v.* Crawford, 94 Ill., 165; Miller *v.* Woodward, 8 Mo., 169; West *v.* Creditors, 3 La. Ann., 529.)

In England it is settled law that when a surety pays a debt due from any defaulter to the Crown, he is entitled to stand in place of the Crown, and to have the benefit of the prerogative process against the person and property of the principal to obtain reimbursement from him.

The debt to the Crown is not regarded as extinguished, but is deemed still subsisting and undischarged, so far as it is necessary to protect the surety. (King *v.* Bennett, 1 Wightwich, Exch., 1; Regina *v.* Salter, 1 H. & N., 274.)

The surety on paying the debt after a writ of extent against the principal debtor, is entitled to a rule on the law officer of the Crown and the defendant in the writ, to show cause why he should not be placed in the situation of the Crown, and the writ of extent put in force in his behalf, until he shall be reimbursed the amount paid by him as surety for the defendant; and the Court will order that, though the Crown have no further claim, the writ of extent be put in force to reimburse the surety. (Regina *v.* Salter, 1 H. & N., 274.)

Third.

It follows from the principles thus indicated that the effect of the payment made by the bail here, was to subrogate them to the present suit, and entitle them to carry it on for their use to its full completion against the property in controversy.

Fourth.

It is clear, independently of the attachment levied upon the property and effects of Williams as an absconding debtor, that the voluntary assignment to Ryder, under the law of New Jersey, alleged in the bill, operated, under the provisions of sections 3466 and 3467 of the Revised Statutes, to let in the priority of the United States in the payment of this debt against Williams and the proceeds of the assigned property.

1. The fact that the assignment to Ryder was made on the 29th of July, 1876, before the entry of the recognizance, cannot affect the question, as clearly appears from the decision of this Court in *United States* v. *Bank of North Carolina*, (6 Peters, 29.) The Court, in that case, expressly held that, under the 5th section of the Act of March 3, 1797, (1 Stats., 515,) the priority to which the United States was entitled, in case of a general assignment made by the debtor of his estate for the payment of debts, comprehended a bond for the payment of duties executed *anterior to the date of the assignment, but payable afterwards.*

The Court also held, in that case, that the bond in question became a "debt due to the United States," within the meaning of the Act, when it was given, and before it became *payable*, if payable only *in futuro*. Said Story, J.: "What debt is here referred to? A debt which is then actually payable to the United States, or a debt then arising to the United States, whether then payable or payable only *in futuro?* We consider the latter the true construction of the term of the Act."

2. The only question in regard to this assignment is whether or not it was such an assignment as is contemplated by the statute, as it has been heretofore interpreted by this Court.

Is it to be deemed a "*voluntary assignment*" of the

"*property*" of Williams, for the benefit of his creditor, within the meaning of the Act?

The assignment is not set out at large in the bill; but it sufficiently appears, from the bill, that the assignment was made, and the proceedings under it were carried on by Ryder, under the provisions of the Act of the State of New Jersey of March 27, 1874, entitled "*An Act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors,*" (Rev. of N. J., p. 36 *et seq.*)

It has been expressly ruled by the Courts of that State, that when an assignment is made under the Act of March 27, 1874, it operates to convey *all* the assignor's property, whether embraced in the inventory attached to the assignment or not; and that if any exception of specific property is made, such exception amounts to nothing; the property passes. (Garretson *v.* Brown, 2 Dutcher, 438; Hays *v.* Doane, 3 Stockt., 91.)

We apprehend, therefore, that the assignment by Williams to Ryder is to be deemed, for the present purposes of the case, to have transferred to Ryder the legal title of all property owned by Williams at that time.

The assignment, thus, was a technical assignment, under the law of the State, in trust for the benefit of all his creditors, and worked such a general divestment of his property as brought the case within the intent and letter of the statute creating priority in favor of the United States.

The legal title of the property has never been conveyed back from Ryder to Williams, and is still held in trust for the creditors, as is now maintained by the assignee, or in trust for Williams; it does not matter which for the purposes of this argument.

The title was in Ryder when the recognizance was entered, when it was forfeited, and when judgment was entered, and execution issued by the United States; and

was set up by him as a bar to the levy attempted to be made by the marshal, under the execution, upon the property covered by the assignment; and the property conveyed was afterwards sold by him as the assignee of Williams. (Bill, p. 11, fol. 29.)

The case was and is, therefore, a plain case of *insolvency*, as defined by the statute, and the decisions of this Court upon the subject.

It is a legal and known insolvency manifested by a notorious act of the debtor according to the law of the State where the assignment was made; and the priority of the United States, therefore, attached to the assigned property and its proceeds in the hands of the assignee. (U. S. *v.* Hoe, 3 Cr. 91; Prince *v.* Bartlett, 8 Cr. 434; U. S. *v.* Howland, 4 Wh. 108; Thelusson *v.* Smith, 2 Wh. 395; Beaston *v.* The Bank, 12 Pet. 102; Conrad *v.* Ins. Co., 1 Pet. 386.)

Fifth.

The attachment issued on November 15, 1876, against Williams as an absconding debtor, under the law of New Jersey, and executed by the seizure of his property as alleged in the bill, also brought the case within the provisions of the Revised Statutes, above cited, and gave the United States the preference intended by the law.

1. This is conceded by the appellees, unless their point that the attachment must be levied upon all, or substantially all, of the debtor's estate, to create priority, can be made available.

The theory would appear to be that though the attachment be directed against *all* the estate and effects of the absconding debtor, there is no trust for the United States unless the Sheriff, under the writ, actually *seizes* all his property, though a part only is necessary to satisfy the de-

mand, and that, by the omission of any property from the levy, the priority of the Government may be effectually defeated by the creditor as to the property attached.

But that is not what the statute means. We suppose it to mean that if any property of an absconding, concealed, or absent debtor, indebted to the United States, is attached by process of law, on behalf of a private creditor, the debt of the Government is to be first paid out of the proceeds.

The officer has, in general, no right to attach more of the debtor's property than is sufficient to satisfy the plaintiff's demand, and he must decide as to the extent and sufficiency of the seizure. (Drake on Attachment, sec. 190.)

He is not required to attach all his property to let in the priority of the United States against the private creditors. (Prince Bartlett, 8 Cr., 434.)

The principle applicable to voluntary assignments of the property of honest, non-absconding debtors, is very different from that to be applied to attachments of property of absent debtors flying from the wrath to come.

2. It appears, by the bill, that the Sheriff seized the property of Williams not covered by the assignment to Ryder, (p. 8, fol. 23,) and this property included the stock in his store which he had bought during the time between the compromise with his creditors and the date of his disappearance, and had been paid for out of the proceeds of the goods mentioned in the assignment.

It sufficiently appears, therefore, that the Sheriff seized, under the attachment, all the property to which Williams, at that time, had any legal title.

3. The attachment law of New Jersey is the Act of March 27, 1874, "*An Act for the relief of creditors against absconding and absent debtors*," (Rev. of N. J., p. 42,) and its intent is to bind the estate of an absent or absconding

debtor for the general and equal benefit of all his creditors. (3 Harrison, 153.) The auditors have power to authorize search for any property of the debtor and the seizure of the same, (sec. 47;) and if the proceeds of the property attached be insufficient to satisfy the debts, to assign to the creditors the choses in action, rights, and credits of the defendant in proportion to their respective debts, (sec. 52.) The Act would thus seem to operate potentially to divest the debtor of the *whole* of his property and devote it to his creditors.

Sixth.

The acts of Williams in connection with these transactions were acts of bankruptcy under the Bankrupt Act of March 2, 1867, and gave the Government an unquestionable right of priority on all his property.

1. The assignment by Williams to Ryder was an "act of bankruptcy," under the Bankruptcy Act of March 2, 1867, and within the meaning of that phrase in section 3466 of the Revised Statutes.

The Act of March 2, 1867, made every conveyance of property, by any person, being bankrupt or insolvent, "*with the intent by such disposition of his property to defeat or or delay the operation of this Act*," an act of bankruptcy.

That Act was modelled to a large degree upon the English bankruptcy law, and must be deemed to have adopted the judicial interpretation of that law, which was that a general assignment by the insolvent for the benefit of his creditors, was an act of bankruptcy, as the debtor thereby attempted to put his estate into a course of distribution different from that prescribed by the statute. (Deacon on Bankruptcy, 72, 73; Griffith on Bankruptcy, 119.)

2. It seems clear that the necessary effect of such an as-

signment is to prevent the property from being distributed among the creditors, under the bankrupt law, and thus defeat the operation of the Act, and as the debtor is to be presumed to have intended the natural and probable consequences of his own act, his intent must have been to defeat the operation of the bankrupt Act.

Such, in general, seems to be the weight of judicial opinion upon this subject in this country. (See the able opinion of Cadwallader, J., in Barnes *v.* Ritter, 8 Phila., 133, concurred in by Justice McKennan; Globe Ins. Co. *v.* Cleveland Ins. Co., Emmons, J., 14 N. B. R., 324; Randall *v.* Sunderland, Deady, J., 3 N. B. R., 18; *In Re* The Union Pacific R. R. Co., Lowell, J., 10 N. B. R., 178; *In Re* Merchants' Ins. Co., Blodgett, J., 6 N. B. R., 43.)

3. It also seems that Williams, by absconding and suffering his property to be seized on attachment, committed other acts of bankruptcy, which subjected his property to the priority of the United States.

Seventh.

The general contention on the part of the appellees that the United States can have no relief by virtue of its right of priority, under the statute, until the remedy by execution against Williams and his bail has been exhausted, and this is shown by the return to the writ, cannot be maintained.

This Court has settled the principle that when the debtor has been divested of his property in one of the modes referred to in the statute, the person who becomes invested with the title is made a *trustee* for the United States, and is bound to pay their debt first out of the proceeds of his property; and that the remedy is immediately and directly

by bill to enforce the trust by the United States. (Beaston *v.* The Bank, 12 Pet., 134; Hunter *v.* U. S., 5 Pet., 188; U. S. *v.* Howland, 4 Wh., 108; U. S. *v.* The Bank, 6 Pet., 29; Lewis *v.* U. S., 92 U. S., 622; Bayne *v.* U. S., 93 U. S., 642.) The case presented is that of a trust fund, a trustee holding it and *cestui que trust* claiming it. Nothing more is necessary to enable the United States to invoke the jurisdiction of a court of equity.

Eighth.

But independently of the priority of the Government under the statute, the bill shows as respects the property mentioned in the assignment to Ryder that the United States as judgment and execution creditors were entitled to subject that property by decree of a court of equity to the payment of the debt; and it is not necessary to obtain this relief that the execution should be returned unsatisfied.

1. The title of the property mentioned in the assignment was held by Ryder in trust for Williams after the settlement with the creditors shown by the bill, which discharged their claims. Where the objects of a trust fail or do not take effect or are accomplished, a resulting trust arises, by operation of law, for the benefit of the grantor. (2 Story Eq. Jur., § 1200.)

2. Where the debtor's estate is merely equitable, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal processes, and equity has jurisdiction without such attempts to subject the property to the payment of the debt.

This proposition was expressly decided by this Court in *Case v. Beauregard*, 101 U. S., 690, 691. (See *Dyer v. Washburn*, 24 How., 355; *Marsell v. The Bank*, 91 U. S., 360, 361.)

Ninth.

We ask that the decree may be reversed, and the cause remanded with directions to allow the bill to be amended, if necessary, in conformity with the precedent in *United States* v. *Howland*, 4 Wh., 108.

J. HUBLEY ASHTON,
Of Counsel for Sureties of Edward P. Williams.

110-729

110-729

Supreme Court of the United States.

No. 156. October Term, 1883.

THE UNITED STATES,

Appellant,

and

SETH B. RYDER, et al.,

Appellees.

On Appeal from U. S. Circuit Court,

For the District of New Jersey.

BRIEF OF JOHN R. EMERY,

Of Counsel with Appellees.

NEWARK, N. J.:
WARD & TICHENOR, LAW CASE PRINTERS, 832 & 834 BROAD ST.
1883.

WARD & TICHENOR, Law Case Printers, 832 and 834 Broad St., Newark, N. J.

United States Supreme Court.

OCTOBER TERM, 1883.—No. 156.

THE UNITED STATES, *Appellant,*
and
SETH B. RYDER and others, *Appellees.*

On Appeal from Circuit Court of the United States for the District of New Jersey.

BRIEF FOR APPELLEES.

STATEMENT.

This is an appeal by, or in the name of, the United States, from a decree of the Circuit Court for the District of New Jersey, sustaining demurrers to a bill filed by the United States, and dismissing the bill.

The case made by the bill is as follows: The United States, at the time of filing the bill—November 13, 1877—was a creditor of E. P. Williams and three other persons, as his bail, upon their joint and several recognizance for $10,000, entered November 8, 1876, in the United States District Court for the District of New Jersey, to secure the appearance of Williams to submit to sentence, for a crime of which he had been convicted. The recognizance was forfeited for his non-appearance, and the United States obtained judgment on the recognizance, against all the recognizors, and had issued and delivered to the Marshal, an execution against the property of all these debt-

ors (*Record*, p. 2, fol. 6.) No dates are given as to the entry of the judgment, the teste of the execution, or its delivery to the officer, or its return day. What has been done or attempted under the writ, as to the *real estate* of Williams, or as to any of the property of the bail, does not precisely, or at all clearly appear—as the return is not set out—but it does appear (*Ib.* p. 12, fol. 33,) that real estate of the bail has been levied on but not sold; and it also appears, if certain facts alleged by the bill (p. 5, fol. 14,) are true, that Williams had several tracts of real estate subject to levy under the execution, and which can now be sold under the judgment. As to the personal property of Williams, the defendant, Ryder, at the time the Marshal proceeded to execute the writ, (p. 3, fol. 7,) was in possession of Williams' store, in which his goods were, and no levy was made on the goods in Ryder's possession, because he refused admission to the store for that purpose, alleging (p. 3, fol. 9,) that there were then no goods of Williams in his hands, subject to levy under the execution, and that the goods were held by him under a title paramount to the execution.

Part of the goods were those included in an assignment for the benefit of creditors, made by Williams to Ryder, as assignee, about three months (July 22d, 1876,) previous to the existence of the claim of the United States, and the portion not thus included had been attached under proceedings taken against Williams as an absconding debtor, on November 25th, 1876, after the entry of the recognizance, but (so far as appears,) before the issuing of the execution or its delivery to the Marshal. (p. 8, fol. 21, &c.) Ryder, being also the auditor in attachment, subsequently sold all of the goods, and now has the proceeds of sale of the goods in the store, and other property mentioned in the assignment. (p. 11, fol. 31.)

Williams' bail (who are characterized in the bill as "sureties,") claimed, that before selling their lands under the execution, the United States, *in order to exonerate*

them, should take equitable proceedings to enforce payment of the judgment, out of these funds in Ryder's hands, which are claimed to be equitably liable for the payment of the judgment. (*Rec.*, p. 12, fol. 33.) Upon this claim, this bill is filed by, or in the name of, the United States, without (so far as appears,) any hearing or notice previously given to the creditors of Williams, at whose expense this exoneration of the bail of a criminal is proposed to be made. The defendants to the bill are Williams, Ryder, and those of the creditors of Williams who have proved their debts under the attachment proceedings; but none of the creditors under the assignment are made parties. As to these creditors under the assignment, the bill alleges that *all of them* made a composition with Williams, accepting indorsed notes for forty per cent. of their claims, and releasing *to Williams* the balance of the claims, and also their rights under the assignment to any of the property assigned. (p. 4, fol. 12.) The *fact* is also stated (p. 6, fol. 17,) that Wyckoff, *one* of the creditors, (for over $2,000,) was *paid in full* by Williams, immediately after putting his claim in, under the assignment, (p. 5, fol. 15,) *in order to carry through the compromise.* No creditor except Wyckoff *has yet* proved his claim under the assignment, but the composition notes (or some of them,) are unpaid, (p. 6, fol. 15,) and it does not appear that any of the creditors signing the composition knew of the payment in full made to Wyckoff in order to carry it through. Ryder, on the execution of the compromise, had delivered, with consent of the creditors, the personal property mentioned in the assignment, (p. 5, fol. 13,) but no conveyance appears to have been made, and upon Williams absconding, Ryder took possession of all the property of Williams. No release to Ryder, as assignee, appears to have been executed by the creditors; all of the goods, &c., in the store of Williams not included in the assignment, were attached by the sheriff of Union county, on an attachment against Williams, as absconding debtor. (p. 8, fol. 23.) These goods are also stated in the bill to have been bought and paid for, out of the proceeds of the sale of the

out fee for so doing, the day of the month and year when he received the same."

This statute changed the previous common law rule that the goods were bound from *teste of the writ.*

[Real estate is bound from the time of the entry of the recognizance (*State* vs. *Stout*, 6 Halst., 362) and sale on execution under it conveys title clear of ~~said~~ sale under subsequent attachment (*Williamson* vs. *Johnson*, 7 Halst., 86.)

Under the attachment law of New Jersey personal property is bound from the execution of the writ.

Rev. of N. J., p. 44, "*Attachment.*"

§ 17: "That the said writ shall bind the rights and credits, moneys and effects, goods and chattels of the defendant, so as aforesaid attached, from the time of executing the same."

§ 18. Real estate from the issuing of the writ.

Neither the date of teste, or delivery of the execution to the marshal, is stated, (*Record*, p 2, fol. 6, &c.) and it was probably delivered after Ryder received the order to sell. (*Ib.* p 3, fol. 9.)

(2.) The remedies by execution and judgment, in common law causes, in the U. S. courts, are the same as upon judgments in the State courts. *Rev. Stat.* § 916. This was a common law cause (*Tidd Pr.*, *1090).

(3.) As to the rents and profits, there can be no lien or even right to receive them, *as rents and profits*, without title to the lands, (judgment and execution in New Jersey have not the operation of *an extent*, as the draftsman of this bill seems to think.)

(4.) The right of priority in payment secured to the United States, in cases within the statute is, of course, not a lien *per se* upon the property. *Rev. Stat.*, § 3466 *U. S.* vs. *Fisher*, 2 Cr. 358. *U. S.* vs. *Hooe*, 3 Cr. 73. *Conard* vs. *Ins. Co.*, 1 Pet. 386. *Beaston* vs. *Farmers' Bank*, 12 Pet. 102.

SECOND POINT.

The United States is not, upon this bill, entitled to any equitable relief or assistance whatever, either as an unsatisfied judgment creditor, or as a creditor claiming preference in payment out of equitable assets, until the remedy by execution against Williams and his bail, has been exhausted.

The bill shows, that the debt to the United States, is one due from Williams (a convicted criminal), and his bail, upon a recognizance forfeited for Williams' failure to appear for sentence in the United States District Court, (*Record*, p. 2, fol. 4, &c.); that upon this recognizance, judgment has been entered, and execution issued from a court of law against Williams and his bail, (*Ib.* p. 2, fol. 6); that the remedy for recovery of the debt, by execution against the bail is not exhausted, but proceedings to realize from their property on the writ are suspended, in order that bail may be exonerated or indemnified out of the equitable assets of the delinquent. (*Ib.* p. 12, fol. 33, 34.) It is not alleged that the execution against the bail cannot be satisfied out of their property subject to execution, and in fact *no return to the writ* is disclosed.

(1.) As against ordinary judgment and execution creditors, the rule is settled, both in this Court and in those of New Jersey, the State where the judgment was obtained, that the remedy at law must be exhausted, before a court of equity will assist in reaching equitable assets for the payment of the judgment.

Jones vs. *Green*, 1 Wall. 330, (1863,) where it was held that "a bill in equity could not lie on behalf of judgment creditors to subject real property of their debtor held by a third party upon a secret trust for him, until a fruitless attempt has been made for its collection, by execution at law," and the general principles are stated, pp. 331 and 332.

See also *Public Works* vs. *Col. College*, 17 *Wall. 521, 530.*

N. J. cases are numerous, from *Robert* vs. *Hodges*, 1 C. E. Green, 299, 303, (Chancellor Green, 1863,) and *Williams* vs. *Williams*, 7 C. E. Green, 573, 581, (Court of Errors and Appeals, 1871,) to the latest case, *Wales* vs. *Lawrence*, 9 Stew. 207, (Vice Chancellor Van Fleet, 1882,) where all the previous cases are cited, and where it was held, that a creditor, who had a judgment against thirteen joint and several debtors, could not sustain a bill to reach property alleged to have been fraudulently conveyed by one of the debtors, because the remedy by execution at law against the other debtors was not exhausted.

The exhaustion of the legal remedy must be shown by the return to the writ; see *Jones* vs. *Green*, *supra*, where, p. 332, it is declared (Field, *J.*) that the Court, in order to ascertain whether the remedy at law has proved effectual, "looks only to the execution and the return of the officer to whom the execution was directed. * * * * The *return* shows whether the remedy at law has proved effectual or not, and from the embarrassments which would attend any other rule the return is held conclusive."

The bill makes no allegation as to the property of the bail, except that a levy has been made upon *certain* real estate which they possessed, but which, "as complainant is informed," is wholly insufficient to satisfy the execution. (*Record*, p. 12, fol. 33.) It should have shown a return unsatisfied, or at least have alleged that *all* the property of the bail, subject to execution, had been exhausted. The bill also shows that Williams is seized of real estate subject to execution (*Rec.*, p. 5, fol. 14), but fails to show what has been done with this.

(2.) The United States, in the prosecution of its claims before the Courts, has no greater or other rights than other suitors, and is subject to the same restrictions. (*Mitchell* vs. *United States*, 9 Pet., 711, 743. *Brent* vs. *Bank of Washington*, 10 Pet., 596, 614, 615.) Where

in the opinion of the Court (p. 614) it is said: "Thus compelled to come into equity to enforce a legal right, the United States must come as other suitors seeking in the administration of the law of equity, relief." (Also, *Cotton* vs. *United States*, 11 How. 229, 231.)

THIRD POINT.

The statute giving priority of payment in certain cases, (Rev. Stat., § 3,466,) does not relieve the United States, on this application for payment out of equitable assets, from first exhausting its legal remedies and other assets, which are *in the first place* liable for the debt.

This act provides: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be *first satisfied;* and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Now, the object and the only object of this statute was to establish the respective rights of the United States and the other creditors of the debtor, *as creditors of the debtor, and in that capacity only*, and the provision that the debts due to the United States shall be *first satisfied*, means that the United States are to be satisfied *before the other creditors* are satisfied.

The act was not intended to make any change or disturbance in the rights and relations of the United States, or of the debtor and his assets in the hands of the assignee, &c., as to *other securities* or remedies for the debt from which, under the usual legal or equitable rules, the debt should *in the first place*, be satisfied; and while the debt due to the United States must

be first satisfied before any of the other creditors of the debtor can be paid by the assignee or officer, yet this assignee or other officer still has, and must protect, the right to have other property, which is in the *first place* liable for the debt exhausted, before making the *first payment* to the United States out of the assets in his hands.

In other words, the language of the statute, "the debts due to the United States shall be *first satisfied*" out of certain assets, means that these debts shall be satisfied out of such assets *before other debts* due from the debtor are satisfied from them, and does not mean that the debts due to the United States shall in all cases, within the reach of the act, be "*in the first place* satisfied" out of the debtor's assets in the hands of the officer. It is only a question of clear definition of the meaning of the words "*first satisfied*" in the statute, and I insist, that from the whole scope and object of the act, the word "*first*" means and is equivalent to "*before other creditors*," and does not mean "*in the first place.*"

See *Public Works* vs. *Colum, Coll.*, 17 Wall., p. 520, cited *supra*, that, in all cases of application for equitable relief, property pledged or conveyed for the payment of the debt must be first applied.

The rights of the United States are entirely protected by this construction, because in cases within the act, no other creditors can be paid out of the assets in the hands of the officer, until the debt of the United States is first satisfied, either from other sources first liable, or from the assets in hand; and to enforce this protection, *Section* 3,467 makes the officer personally liable for the whole debt due to the United States in case of any such payment. Pending this satisfaction of *its* debt, Ryder declines, and properly declines to pay any other creditor, even by order of the State Court. *Record*, p. 12, fol. 32.

Sec. 3467. "Every executor, &c., or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall

become answerable in his own person and estate for the debts so due to the United States. * * "

The bail in this case are not, and could not truthfully have been declared to be, irresponsible, or not to have sufficient property subject to execution, out of which to make the debt, and the right of Williams' creditors to require the United States to exhaust the property first liable at law, was one to be especially asserted in this case, for,

FOURTH POINT.

The ordinary rule requiring the exhaustion of legal remedies or assets, should in this case be most strictly enforced against the United States, because it appears by the bill, that proceedings against the bail on the execution are suspended, and the equitable assets of Williams are sought, in order to exonerate or indemnify the bail out of these equitable assets; and such exoneration or indemnification is illegal and against public policy.

The bill describes the bail of Williams as "sureties," but as the nature of the indebtedness is also set out, the character of their relations to Williams is a matter of law. They are in fact, bail for his appearance in a criminal proceeding, and are therefore not his sureties, but principal debtors, equally and exactly liable with him.

This recognizance is not a security for the payment of a debt or claim, due from Williams to the United States, as in civil cases, but is a security, taken by the Government, for the appearance of Williams to answer the demands of public justice. The object of such recognizance is *the appearance*, not the payment of the penalty, and the release upon bail is a privilege conceded by free governments in favor of personal liberty, not a device for fixing the price of escape from punishment.

On such recognizance, both bail and delinquent are together and equally bound, *for the appearance*, and it is as much the duty of the bail to see that he appears, as it is his duty to appear. For the purpose of securing his appearance, the bail have extensive powers over the delinquent, being authorized to seize him anywhere in the United States, and, possibly, beyond its limits. The delinquent has no special duty to perform as to the bail, and certainly the duty toward him is not the payment of the penalty, but the appearance. The duty of *paying the penalty*, arose against all the recognizors equally at the same time, and for the same reason, viz: Williams' non-appearance. Bail in criminal cases are therefore in this respect principal debtors, and they are not entitled to indemnity from their principal. It was so declared in *Jones* vs. *Orchard*, 16 C. B. *614 (1855,) where the question was *directly raised* and fully argued, although not decided, because the case went on another point. It was there said by Jervis, *Ch. J.*, p. 624: "The rule was moved, on the ground that a contract in a criminal case to indemnify the bail against the consequences of a default of the principal's appearance, on the trial of an indictment, is contrary to public policy, and therefore the law will not presume any such contract. It is unnecessary to decide that point on the present occasion, although we are inclined to think the objection well founded, and that such a contract would be contrary to public policy, inasmuch as it would be in effect giving the public the security of one person instead of two." See also the remarks of the Judges, Maule, Creswell and Jervis, during the argument, p. 620. Justice Maule, p. 620, strikes the real ground of public policy: "The Crown and the public have a right that the bail should be persons of ability and *vigilance* sufficient to secure the appearance and prevent the absconding of the delinquent. If they are indemnified, *they would stand in a different position as to their interest*, to that purpose, than they otherwise would do."

Later, the point was expressly decided in ~~Hughes~~ Cripps vs. ~~Hartnell~~ Hartnell, 4 B. & S., 414 (1862), where Pollock, Ch. B.,

says, p. 419, that "where bail is given in a criminal proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him," and Williams, J., p. 420, says: "I think there is a *distinction* between the recognizance of bail in a civil suit and the recognizance given for the appearance of a defendant in a criminal proceeding. * * * I think that where bail is given in a criminal suit, there is certainly no debt or duty which can be considered as *due to the surety* from the party on whose behalf the recognizance was given."

Other reasons why a rule allowing indemnification of bail would be against public policy, may be suggested in the opportunities to defraud, which it would afford to dishonest bail, by securing the property of the fugitive, either with or without collusion, at the expense of his creditors.

If, then, on these considerations of public policy, bail could not in a court of law, find indemnity for their default, by pursuing their principal, why should a court of equity, even at the suit of the government, give the slightest assistance to a suit in which it is openly declared that the bail are not pursued, and the reason given is that they want first the assistance of the court to reach Williams' property for their exoneration? and why, too, should this be done at the expense of Williams' creditors?

The bail have, since this decree, paid to the United States the whole of the debt due, and this appeal and suit is now in fact a private suit, carried on by the bail at their own expense, in the name of the United States, (which may secure them against costs) in order that, under this false cover of the equitable rights of the United States, they may, out of Williams' property, and at the expense of his creditors, secure an indemnification, which the law in its public policy prevents them from acquiring in their own names and standing on their own right. Should a court of equity give any assistance in

carrying out this scheme, or in its favor relax (even for the United States) any ordinary rule of equity?

U. S. vs. *Preston*, 4 Wash., 446. Surety in civil case on being subrogated to rights of United States, is not entitled to sue in its name.

FIFTH POINT.

As a creditor claiming *priority* in payment out of assets in the attachment proceedings, the United States is not entitled to any relief, for the additional reason that the bill does not show that the circumstances exist, upon which the preference under the statute rises, viz., the attachment of "the estate and effects" of an absconding debtor by process of law.

(1) The section (3,466) provides that the priority thereby established "shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which *the estate and effects* of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

I submit that the attachment must be of the estate and effects, in the sense of *all, or substantially all*, of his estate.

In reference to assignments it has always been held that the preference did not arise where only a portion, and not all, or substantially all of the estate was assigned.

Thus, in *United States* vs. *Hooe*, 3 Cr., 73, 91, it was held that where there was a *bona-fide* conveyance by an insolvent debtor of *part* of his property to secure a creditor, the United States had no preference, and that by the "property" and "assignment thereof," was meant all of a debtor's property.

So in *United States* vs. *Howland*, 4 Wh., 108, it was held that an assignment by insolvent debtors of all their property mentioned in a schedule annexed to the deed, would not be such an assignment as gave a right to preference under the act, unless the United States *proved that this was all* of their property.

In this bill it is alleged that none of the property mentioned in the assignment was taken under the attachment. (*Record*, p. 8, fol. 23; p. 9, fol. 24.).

The amount and value of this, as stated in the deed of assignment, (*Record*, p. 4, fol. 10, &c.) is, real estate, $7,800; personal property, $22,050.

And Williams is stated (*Record*, p. 5, fol. 14,) to have been legally seized and actually possessed of all this property on the entry of the recognizance, Nov. 8, 1876. The property taken under the attachment was appraised at $1,259.29. The debts proved in attachment are about $40,000.

So that if the attachment, like the assignment, is to be of *all of the estate and effects* of the debtor, the right of prior payment does not in this case arise by *reason of the attachment.*

(2) Was the debt *due* before the attachment?

Sixth Point.

No relief can be given to the United States upon the present bill as a creditor claiming statutory preference in payment out of funds arising from the proceeds of sale of goods mentioned in the assignment, because,

(1.) The bill, besides alleging (p. 5, fol. 14,) that subsequent to the assignment, Williams became the legal owner and possessor of all the property he had previously conveyed, also states that the sale was not by

virtue of the assignment, and as to the goods included in it, was void.

Under the act the proceeds must be rightfully in the hands of the assignee, and there can be no trust toward the United States, under the assignment.

Beaston vs. *Farmers' Bank*, 12 Pet., 102, 133.

(2.) Even if the bill alleged that the legal title to the property mentioned in the assignment was still held by Ryder, and that he sold the goods as assignee, relief cannot be granted on this bill, because by the assignment law of New Jersey, the property covered by the assignment is conveyed in trust, only, for the creditors whose claims existed at the date of the assignment, July 27, 1876, (*Rec.*, p. 3, fol. 9,) and none of these creditors are made parties to the bill, although a list of them is annexed to the assignment. Title "Assignment," *Rev. of N. J.*, p. 36, &c.:

§ 1. "That every conveyance or assignment, made by a debtor or debtors, of his, her, or their estates, real or personal, or both, in trust to the assignee or assignees, for the creditors of such debtor or debtors, shall be made for their equal benefit, in proportion to their several demands, to the net amount that shall come to the hands of said assignee or assignees for distribution. * * *."

§ 2. "The debtor or debtors making such assignment, shall annex to such assignment or conveyance an inventory, under oath or affirmation, of his, her, or their estate, real and personal, according to the best of their knowledge, together with a list of his, her, or their creditors, and the amount of their respective claims." The inventory is not conclusive, and the assignee takes any other property of the debtor belonging to him at the time of the assignment, comprehended within its general terms.

§ 22. "That any creditor may exhibit not only any debt due, but those to grow due, making in such case a reasonable rebate, when interest is not accruing on the same."

Under this assignment act, the trust is not executed by the payment of the debts proved within the time limited by the act, (if indeed there is any such limitation), so that the property *then* belongs to the debtor; but the

estate is then held in trust for all the creditors, whether they have proved in time or not, and until the property has been sold and distributed under the act.

§ 20. "If any creditor shall not exhibit his, her, or their claims within the time allowed by this act, such claim shall be barred of a dividend, *unless the estate shall prove sufficient after the debts exhibited and allowed are fully satisfied*, or such creditor shall find some other estates not accounted for by the assignee or assignees, before distribution, in which case such barred creditor shall be entitled to a ratable proportion thereof."

In *Hays* vs. *Doane*, 3 Stockt., (N. J. Eq.) 84, 97. (Ch Williamson, 1855) it was held that a creditor who had not proved his claim, could call the assignee to account in Chancery for a fraudulent sale of property, because he was interested in the surplus remaining after the debts proved were paid.

In this case, if the funds be *held under the assignment*, after Wyckoff, the creditor who has proved has been paid, the assignee holds the funds in trust for all the creditors whose debts existed at the time of the assignment.

The allegation that Wyckoff's claim is false and that all the other creditors are paid, and that they have no rights under the assignment, cannot be acted upon without bringing them into court.

Moreover, the payment of other claims and the termination of all their rights under the assignment, is only alleged as a conclusion of law, from certain facts stated, viz.: the release on an agreement for composition, (*Rec.* p. 4, fol. 12), and the law in such cases is:

See *Forsyth's Comp. with Cred.* *32–33, and cases cited, "that where the debtor makes default in performing the conditions imposed upon him as his part of the agreement, he remits the creditors *to their original rights*, and may be sued by them for the full amount of their respective debts;" and it makes no difference that the composition notes are endorsed. There is no allegation in the bill that any of these composition notes were paid at maturity, or were ever paid, and it is shown (*Rec.*